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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77145880
Applicant	Advanced Pavement Technology Inc.
Applied for Mark	ECOLOGICAL PAVER SYSTEMS
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Submission	Appeal Brief
Attachments	Appellant's Brief (30127).PDF (7 pages)(345632 bytes)
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Date	07/06/2009

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of:)	
)	Trademark ECOLOGICAL PAVER SYSTEMS
ADVANCED PAVEMENT)	
TECHNOLOGY INC.)	Law Office 106
)	
Serial No. 77/145,880)	Examining Attorney Bernice Middleton
)	
Filed April 2, 2007)	

APPELLANT'S BRIEF ON APPEAL

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

Sir:

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DESCRIPTION OF THE RECORD

The record includes the original intent-to-use application filed on April 2, 2007, Applicant's Amendment and Response filed January 25, 2008, Applicant's Response filed October 3, 2008, and the dictionary definitions and attachments included with the Office Actions.

STATEMENT OF THE ISSUES

Whether the mark ECOLOGICAL PAVER SYSTEMS is merely descriptive of "paving contractor services".

RECITATION OF THE FACTS

Applicant seeks registration of the mark ECOLOGICAL PAVER SYSTEMS. The services specified in the application are for paving contractor services.

An amendment disclaiming the exclusive right to use "PAVER SYSTEMS" apart from the mark was filed on January 25, 2008.

ARGUMENT

Applicant traverses the refusal of the mark for alleged descriptiveness.

The refusal is based upon an incorrect assertion that the mark "immediately conveys that applicant's services utilize environmentally friendly methods and/or products." In this regard, Attachments 14-15 of the Office Action do not support this assertion because none of the dictionary definitions for "ecological" provided therein are

at all descriptive of the services sought in the registration. Indeed, none of the definitions in those attachments support the assertion that Applicant's mark "conveys that applicant's services utilize environmentally friendly methods and/or products" because none of the definitions say anything about environmentally friendly methods or products. Rather, the descriptions are absolutely neutral with respect to any friendliness or unfriendliness with respect to the environment, and do not in any way say anything about methods or products.

Furthermore, the definition of "ecological" shown in Attachments 14-15 establish that, at a minimum, a multi-stage reasoning process and/or the use of imagination, thought, and/or perception is required to discern the nature of the services associated with the mark. For example, Applicant's services are not a branch of biology or a branch of sociology as described in the definitions in Attachment 14 and 15, nor are they directed towards the "study of environmental effects of modern civilization on the environment, with a view towards preservation or reversal through conservation" as defined in Attachment 15. Thus, a multi-stage reasoning process and/or the use of imagination, thought and perception are required to discern the nature of the services associated with the mark because one must first eliminate the possibilities that the mark is referring to a branch of biology or a branch of sociology, or to the study of environmental effects of modern civilization on the environment, with a view towards preservation or reversal through conservation, before one can even attempt to determine whether it involves services that utilize environmentally friendly methods and/or products as asserted by the Examiner.

The refusal is also based upon an incorrect assertion that "the term is a part of the lexicon of the marketplace for such services." In making this assertion, the Examiner relies upon identical language found in two articles (evidence 3-3 and evidence 4-1 of the April 3, 2008 Office Action) wherein Applicant's use of the mark is reported carelessly by the copy writer in a paraphrasing of the Applicant's use of the mark. Such misparaphrasing of Applicant's use of its own mark is hardly evidence of descriptiveness. Evidence 1-2 of Attachment 2 of the same Office Action appears to be of similar quality in that it again appears to be a misuse and/or paraphrasing of Applicant's mark by a copy writer. Again, this does not constitute evidence of descriptiveness or that Applicant's mark is "a part of the lexicon of the marketplace for such services".

Equally unpersuasive is the reliance on the phrase "ecological pavers" buried in the fine print of multiple pages of meeting minutes from a 2004 city council meeting, such as presented in Attachment 6 evidence 2-4 of the April 3, 2008 Office Action. Such obscure use is simply not evidence that Applicant's mark "is part of the lexicon of the marketplace for such services", as asserted by the Examiner.

Also unpersuasive is the Wikipedia article of Attachment 22 and the attachments (4 of 100 documents, 6 of 100 documents and 13 of 100 documents of the most recent Office Action), none of which are sufficient to establish that Applicant's mark "is part of the lexicon of the marketplace for such services", as asserted in the Office Action. In this regard, three documents out of at least 100 from a Lexis-Nexis search combined with a lone Wikipedia article cannot be sufficient to establish that Applicant's mark is

part of the lexicon of the marketplace. This is especially true in light of the dictionary definitions provided by the Examiner, none of which support the Examiner's assertion.¹

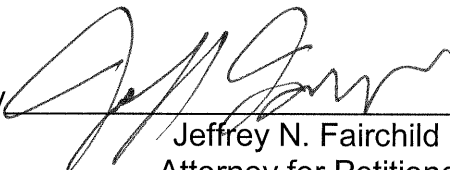
The remainder of the evidence appears to be directed at the words "paver" and the word "systems" which, have already been disclaimed in the application.

Given the shortcomings of the evidence, and that multi-stage reasoning and/or the use of imagination are required to discern the nature of the services associated with the mark, the refusal should be withdrawn in favor of Applicant. See *In re Conductive Systems, Inc.*, 220 USPQ 84, 86 (TTAB 1983) stating that "unlike the situation in determining likelihood of confusion under Section 2(d) of the Trademark Act, it is clear that such doubts are to be resolved in favor of applicants."

In view of the foregoing, Applicant respectfully requests reconsideration of the refusal based on descriptiveness and approval of the application.

Respectfully submitted,

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By 
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¹ In this regard, reliance on Wikipedia has been criticized and it has been noted that "the better practice with respect to Wikipedia evidence is to corroborate the evidence with other reliable sources, including Wikipedia's sources". *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032-33 (TTAB 2007) (relying on a **dictionary definition** to corroborate Wikipedia evidence). The dictionary definition in this case does not corroborate the Wikipedia article relied on by the Examiner.